

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

J.E.F.M., a minor, by and through his Next Friend,  
Bob Ekblad; et al.,

Plaintiffs-Petitioners,

v.

Eric H. HOLDER, Attorney General, United  
States; et al.,

Defendants-Respondents.

Case No. 2:14-cv-01026-TSZ

MOTION FOR PARTIAL  
RECONSIDERATION OF COURT'S  
ORDER ON DEFENDANTS'  
MOTION TO DISMISS

NOTING DATE: Monday, April 27,  
2015

1 Plaintiffs respectfully request that the Court reconsider three limited aspects of its Order  
 2 on Defendants' Motion to Dismiss, Dkt. 114, under Local Rules W.D. Wash. LCR 7(h). First,  
 3 under the legal rules set forth in the Order, A.E.G.E.'s claims are unquestionably ripe because  
 4 his charging document was already filed with the immigration court. Second, under this Court's  
 5 prior interpretation of 8 U.S.C. § 1252(g), G.J.C.P.'s claims are not jurisdictionally barred,  
 6 because her claim does not challenge any decision that falls within Section 1252(g)'s ambit.  
 7 Dkt. 114 at 10. Third, 8 U.S.C. § 1252(f)(1) does not bar class-wide injunctive relief. The Ninth  
 8 Circuit specifically permitted such relief in *Rodriguez v. Hayes*, 591 F.3d 1105, 1119-20 (9th  
 9 Cir. 2010), and in *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) affirmed an order  
 10 granting class-wide relief. This Court should either reverse its ruling outright or refrain from  
 11 addressing the issue, as it is premature.

## 12 ARGUMENT

13 This Court may reconsider its ruling if it rests "on an inaccurate view of the law," *Smith*  
 14 *v. Pac. Props. and Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004), or other "manifest error,"  
 15 including errors of fact, W.D. Wash. Local Rule 7(h).

### 16 A. Under the Ripeness Standard This Court Adopted, A.E.G.E.'s Claims Are 17 Ripe for Review Because His Removal Proceedings Have Commenced.

18 This Court concluded that it had "jurisdiction [] with respect to juveniles *currently in*  
 19 *removal proceedings*" as to their constitutional due process claims. Dkt. 114 at 7 (emphasis  
 20 added). It then dismissed three-year-old A.E.G.E. from the case based on the incorrect belief  
 21 that his proceedings had not commenced. *Id.* at 7-8.

22 Contrary to Defendants' statements at oral argument, Dkt. 110, Transcript of March 6,  
 23 2015 hearing (hereinafter Tr.) at 12:10-13:3 removal proceedings have commenced against  
 24 A.E.G.E. The agency's own rules make clear that removal proceedings formally commence  
 25 when DHS files the Notice to Appear ("NTA")—i.e., the charging document—with the  
 26 immigration court. *See* 8 C.F.R. 1239.1(a) ("Every removal proceeding conducted under

1 section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an  
 2 alien is commenced by the filing of a notice to appear with the immigration court.”); 8 C.F.R.  
 3 1003.14 (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a  
 4 charging document is filed with the Immigration Court by the Service.”); Immigration Court  
 5 Practice Manual § 4.2(a) (2013) (same); *see also Samayoa-Martinez v. Holder*, 558 F.3d 897,  
 6 901 (9th Cir. 2009) (“Formal removal proceedings do not commence until the INS has filed an  
 7 NTA in the immigration court.”); *Dababneh v. Gonzales*, 471 F.3d 806, 809-10 (7th Cir. 2006)  
 8 (finding that IJ had jurisdiction at time NTA was filed, even though notice of hearing date was  
 9 issued later); *Matter of Sanchez-Herbert*, 26 I. & N. Dec. 43, 44 (BIA 2012) (“Once a notice to  
 10 appear has been properly filed with the Immigration Court, jurisdiction vests. As long as the  
 11 allegations and charges stated in the notice to appear continue to be applicable, *the alien*  
 12 *remains subject to removal.*”) (emphasis added and citation omitted).

13 Here, there can be no dispute that DHS has issued an NTA against A.E.G.E. and filed it  
 14 with the immigration court, as Plaintiffs stated at oral argument. Tr. at 81:17-82:5; *see also*  
 15 Declaration of Talia Inlender (to be concurrently filed herewith), ¶¶ 4-6, (confirming that the  
 16 Government filed A.E.G.E.’s NTA with the court, that he was previously scheduled for an  
 17 immigration court hearing in Texas in September 2014, and that he is now in the court’s  
 18 Automated Status Query system, albeit without a new date); Dkt. 95, ¶¶ 21, 101.<sup>1</sup> Accordingly,  
 19 three-year-old A.E.G.E. is in the exact same position as the Plaintiffs whose claims this Court  
 20 found ripe, because he too is “currently in removal proceedings.”<sup>2</sup>

#### 21 **B. As Previously Interpreted By This Court, Section 1252(g) Does Not Bar**

22  
 23 <sup>1</sup> This Court may rely on A.E.G.E.’s NTA and hearing notice in resolving Defendants’ Motion to Dismiss because  
 24 the complaint necessarily relies upon it, thereby incorporating it by reference. *Davis v. HSBC Bank.*, 691 F.3d  
 25 1152, 1159-60 (9th Cir. 2012). Further, Fed. R. Civ. P. 12(b)(1) permits consideration of the NTA and hearing  
 notice as documents of independent legal significance. *Walker v. Woodford*, 454 F. Supp. 2d 1007, 1022 (S.D. Cal.  
 2006) (“Documents that are part of the public record may be judicially noticed to show, for example, that a judicial  
 proceeding occurred or that a document was filed in another court case . . .”).

26 <sup>2</sup> Defendants never asserted that A.E.G.E.’s claims were unripe prior to oral argument, despite having argued (on  
 other grounds) that he should not be added to the case. *See, e.g.*, Dkt. 97 n.5.

### G.J.C.P.'s Claims.

This Court has previously recognized that Section 1252(g) does not bar the claims raised here because its scope is “narrow,” and focuses only on the three acts expressly enumerated in the statute – to “commence proceedings, adjudicate cases, or execute removal orders.” Dkt. 114 at 10 (quoting *Reno v. Arab-Am. Discrimination Comm.*, 525 U.S. 471, 482 (1999)). For this reason, the Court previously held that the non-dismissed Plaintiffs’ “right-to-counsel claim[s] do[] not implicate the Attorney General’s discretion” over those three specific acts, such that Section 1252(g) does not bar their claims. *Id* at 11.

G.J.C.P.’s legal claim—namely, that she was denied her right to appointed counsel in her removal proceeding—is identical to that of the non-dismissed Plaintiffs for purposes of Section 1252(g). She too argues that “the . . . Due Process Clause of the Fifth Amendment mandate that the Government ensure that all children in immigration proceedings have legal counsel.” Dkt. 95 ¶¶ 113, 117. While G.J.C.P. differs from the other Plaintiffs insofar as she already has a removal order, that fact does not bring her claim within Section 1252(g)’s bar. G.J.C.P.’s claim does not “aris[e] from the decision or action by the Attorney General to . . . execute removal orders,” Dkt. 114 at 10, as she does not challenge the discretionary decisions to commence proceedings, adjudicate her case, or execute a removal order against her. Rather, her claim arises from Defendants’ conduct in denying her appointed counsel in her removal case.<sup>3</sup>

The Ninth Circuit cases this Court cited regarding Section 1252(g) make clear that the existence of a removal order against G.J.C.P. does not suffice to bar review of her claims. *See* Dkt. 114 at 10 (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 (9th Cir. 1999), and *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998)). In *Walters*, the Ninth Circuit rejected

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<sup>3</sup> While Defendants raised Section 1252(g) in their original Motion to Dismiss, Dkt. 80 at 9-12, they contended only that the statute barred Plaintiffs’ supposed request to “to enjoin the removal proceedings of Plaintiffs and all noncitizen minors in the United States.” *Id.* at 10. After this Court rejected that argument, Dkt. 81 at 3, and after G.J.C.P. was added to the case, Defendants did not raise 1252(g) again. *See generally* Dkts. 97, 104. Nor did Defendants argue that Section 1252(g) barred G.J.C.P.’s claim at oral argument.

1 the notion that Section 1252(g) bars a claim whenever someone “seeks relief that would  
 2 hamper the Attorney General’s discretion to execute [her] removal order.” Dkt. 114 at 11.  
 3 There, the Government argued that Section 1252(g) precluded “any relief that interferes with its  
 4 attempt to execute deportation orders against [] class members.” *Walters*, 145 F.3d at 1052. The  
 5 Ninth Circuit held otherwise, using reasoning that applies precisely to the situation here:  
 6 “[a]lthough the constitutional violations ultimately may have led to the plaintiffs’ erroneous  
 7 deportation, the resulting removal orders were simply a consequence of the violations, not the  
 8 basis of the claims.” *Id.*<sup>4</sup> Indeed, the *Walters* court went on to affirm an injunction that both  
 9 *forbade* the Government from executing the deportation orders of certain class members and  
 10 *compelled* the Government to reopen their cases—relief that would be impossible to grant if  
 11 Section 1252(g) applied so broadly. *Id.* at 1037, 1052-53. Similarly, in *Barahona-Gomez*, the  
 12 Ninth Circuit explained that Section 1252(g) is “directed against a particular evil: attempts to  
 13 impose judicial constraints upon prosecutorial discretion.” 236 F.3d at 1118 (holding Section  
 14 1252(g) does not bar review of claim alleging Government improperly halted consideration of  
 15 plaintiffs’ applications for immigration relief) (citation omitted). But G.J.C.P. does not  
 16 challenge the agency’s exercise of discretion; she challenges the legality of the agency’s refusal  
 17 to provide counsel, not its decision to execute her removal order.

18 The Court also suggested that G.J.C.P.’s claim is barred because she seeks to  
 19 “circumvent the statutory restrictions on challenging a removal order issued in absentia.” Dkt.  
 20 114 at 11 (citing 8 U.S.C. §§ 1229a(b)(5)(C)-(D)). To the extent this constitutes a separate  
 21 basis for barring her claims, it is incorrect. For reasons this Court’s Order already explains as to  
 22 the other Plaintiffs, G.J.C.P. “present[s] a ‘pattern and practice’ claim as to which recourse to  
 23

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24 <sup>4</sup> Indeed, if Section 1252(g) is implicated whenever an immigrant “seeks relief that would hamper . . . the  
 25 discretion to execute” a removal order, Dkt. 114 at 11, courts would lack authority to issue all kinds of plainly  
 26 lawful forms of relief. For example, a temporary stay of removal pending judicial review clearly “hampers” the  
 Government’s ability to execute a removal order, yet courts issue such stays routinely. *See, e.g., Nken v. Holder*,  
 556 U.S. 418, 426-27 (2009).

1 the administrative process is guaranteed to fail.” Dkt. 114 at 9. Were G.J.C.P. to file a motion  
 2 to reopen her proceedings based on the appointed counsel claim she raises here, the agency  
 3 would unquestionably deny it. Dkt. 114 at 8. Thus, recourse to the agency will fail.

4 **C. Plaintiffs Request that This Court Either Reverse Its Ruling as to Section**  
 5 **1252(f)(1)’s Applicability or Defer Final Resolution of That Issue Until Plaintiffs**  
 6 **Seek Classwide Relief.**

7 Finally, Plaintiffs ask that this Court reconsider its ruling that “the Court lacks  
 8 jurisdiction to grant classwide injunctive relief” Dkt. 114 at 36, for two reasons.

9 *First*, the Court’s ruling *directly conflicts* with *Rodriguez v. Hayes*, 591 F.3d 1105 (9th  
 10 Cir. 2009). While *Rodriguez* did hold that Section 1252(f)(1) permits the issuance of class-wide  
 11 declaratory relief, Dkt. 114 at 36-37 (citing *Rodriguez*, 591 F.3d at 1119), *Rodriguez* issued *two*  
 12 holdings with respect to Section 1252(f)(1). *See Rodriguez*, 591 F.3d at 1119 (“Respondents are  
 13 *doubly* mistaken.”) (emphasis added). After concluding that Section 1252(f) did not foreclose  
 14 declaratory relief, *Rodriguez* also held that Section 1252(f) did not bar injunctions to halt the  
 15 *unlawful operation* of the statute, stating “[i]n addition, we conclude that Section 1252(f) does  
 16 *not* bar injunctive relief for the proposed class.” *Id.* at 1120 (emphasis added). On remand, the  
 17 *Rodriguez* district court granted plaintiffs a *classwide preliminary injunction*, which the Ninth  
 18 Circuit then affirmed in its entirety. *Rodriguez v. Robbins*, 2012 WL 7653016, \*1 (C.D. Cal.  
 19 Sept. 13, 2012), *aff’d* 715 F.3d 1127, 1131 (9th Cir. 2013). Thus, this Court’s decision with  
 20 respect to Section 1252(f) is directly contrary to the most recent Ninth Circuit decision on this  
 21 very issue.

22 Consistent with *Rodriguez*, district courts around the country have issued class-wide  
 23 injunctions, notwithstanding Section 1252(f)(1), where they serve to facilitate rather than  
 24 undermine the lawful “operation” of the immigration laws. *Rivera v. Holder*, 2015 WL  
 25 1632739, at \*12 (W.D. Wash. Apr. 13, 2015) (granting class-wide injunction against unlawful  
 26 operation of detention or removal provisions); *R.I.L.R. v. Johnson*, \_\_ F. Supp. 3d \_\_, 2015 WL

1 737117, \*12 (D.D.C. Feb. 20, 2015) (same); *Reid v. Donelan*, 22 F. Supp. 3d 84, 90 (D. Mass.  
 2 2014) (same); *Preap v. Johnson*, 303 F.R.D. 566, 571 n.1 (N.D. Cal. 2014) (same).<sup>5</sup>

3 *Second*, the Court's ruling on Section 1252(f)(1) is premature because Plaintiffs have not  
 4 sought class-wide relief of any kind, as no class has been certified. *See* Dkt. 85 at 12-13; Dkt. 98  
 5 at 17 n.21; Dkt. 117. In addition, the ruling is premature because the Court specifically declined  
 6 to consider whether the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, provides a mechanism  
 7 for affording class-wide relief. *See* Dkt. 114 at 22 n.14. If the Court were to conclude that it does,  
 8 Section 1252(f)(1) would pose no bar to class-wide injunctive relief, because an injunction  
 9 appointing attorneys under the CJA would in no way enjoin or restrain class members' removal  
 10 proceedings. Dkt. 98 at 12-16; Dkt 86 at 7-8.<sup>6</sup>

11 For these reasons, Plaintiffs respectfully request that the Court either reverse its ruling  
 12 that Section 1252(f)(1) bars all class-wide injunctive relief in this case, or defer the issue until it  
 13 is squarely presented – i.e., until Plaintiffs actually seek class-wide relief of some kind.

#### 14 CONCLUSION

15 For these reasons, Plaintiffs respectfully request that the Court grant this Motion.

16 DATED this 27th day of April, 2015.

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23 <sup>5</sup> The cases cited in this Court's order, Dkt. 114 at 37, do not hold otherwise. *Arevalo v. Ashcroft*, 344 F.3d 1, 7  
 24 (1st Cir. 2007), addressed an entirely different issue: whether Section 1252(f)(2) (*not* (f)(1)) governed requests for  
 25 stays of removal in individual cases. 344 F.3d at 4. *Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011), stated that class-  
 wide declaratory relief was available, but the plaintiffs only sought declaratory relief, not injunctive relief. *See*

26 <sup>6</sup> In addition, Plaintiffs have not yet had no opportunity to craft a request for injunctive relief that might fit within  
 Section 1252(f)(1)'s exception clause for individuals "against whom proceedings . . . have been initiated."



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CERTIFICATE OF ECF FILING AND SERVICE

I certify that on April 27, 2015, I arranged for electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record:

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